Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1264

READING HOSPITAL AND MEDICAL CENTER,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO._____

READING HOSPITAL AND MEDICAL CENTER,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Reading Hospital and Medical Center, prays that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 16, 1977.

OPINIONS BELOW

1. Order of the United States Court of Appeals for the Third Circuit dated December 14, 1977 denying Petitioner's motion for rehearing (not officially reported) (Appendix at 1a).

2. Order of the United States Court of Appeals for the Third Circuit dated September 16, 1977 denying Petitioner's motion to vacate and set aside the order of the Respondent, and granting Respondent's petition for enforcement of its order (not officially reported) (Appendix at 2a).

3. Decision and order of the National Labor Relations Board adopting the order recommended by the Administrative Law Judge dated October 27, 1976, 226 NLRB No. 99 (1976), (Appendix at 3a).

4. Decision of the Administrative Law Judge of the National Labor Relations Board dated May 27, 1978 (Appendix at 5a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1977 (Appendix at 2a). A timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 14, 1977 (Appendix at 1a). Mandate was stayed to and including March 14, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the mutual aid and protection clause of Section 7 of the National Labor Relations Act protect employee activity which is unrelated to the immediate employment relationship, and which is directed toward a matter over which the employer has no power to change or control?

APPLICABLE STATUTES

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, reads in pertinent part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1) reads in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in §157 of this title."

Section 10(c) of the Act, 29 U.S.C. §160(c) reads in pertinent part as follows:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review a decision of the Court of Appeals for the Third Circuit enforcing a final order of the National Labor Relations Board which determined that Petitioner, Reading Hospital and Medical Center, suspended and discharged an employee, Sheila Rea, for engaging in concerted activity which was protected under the Act.

This case arose out of a decision of Petitioner to suspend, and later discharge, Sheila Rea. Rea, a licensed practical nurse, was hired by Petitioner in October, 1970 and worked thereafter as an operating room technician until her suspension in January, 1975 and discharge in February of the same year. During the term of Rea's em-

ployment, Petitioner conducted a surgical residency program. Control of the program resided not with Petitioner but with the American College of Surgeons, American Board of Surgery, Council on Medical Education and the American Medical Association.

In July, 1974, over Petitioner's objection, the above bodies decided to terminate the surgical residency program at Reading Hospital effective January, 1975. On or about January 26, 1975, Rea and the other operating room employees learned of the discontinuance of the surgical residency program. During the ensuing discussion, Rea made derogatory remarks about Petitioner and expressed an intention to write a letter to the local press disparaging Petitioner for the loss of the program.

Petitioner's officials became concerned with the tenor of Rea's attitude and about the impact such a letter would have on the community which Petitioner served. It was decided to suspend Rea pending a full investigation of the circumstances. During the resulting investigation, Rea's unsatisfactory employment record was examined. Considering Rea's documented record of excessive absenteeism and poor work performance and mindful of the gravity of the acts of disloyalty, Petitioner decided to separate Rea from her employment. Accordingly, she was discharged.

As a result of this discharge, an unfair labor practice charge was filed on February 4, 1975 by District 1199P, National Union of Hospital and Health Care Employees, charging Petitioner with violating the Act. The Board issued a complaint on October 31, 1975, alleging violations of Section 8(a)(1) of the Act.

After a hearing, an Administrative Law Judge found the employee's conduct to be protected under Section 7 of the Act, and that Petitioner had disciplined the employee for engaging in protected activity in violation of Section 8(a)(1) of the Act. Petitioner was ordered to cease and desist from further violations of Section 8(a)(1) and to reinstate Rea with back pay (Appendix at 19a). On October 27, 1976, the Board issued a decision and order affirming the decision of the Administrative Law Judge and adopting his order (Appendix at 3a).

On petition for review under Section 10(f) of the Act, the United States Court of Appeals for the Third Circuit affirmed the decision of the Board without opinion (Appendix at 2a). A timely petition for rehearing and rehearing *en banc* was denied.

It was Petitioner's position before the Administrative Law Judge, the Board, the Court of Appeals and continues to be its position before this Honorable Court that Sheila Rea's conduct was not protected under the Act and that her discharge was for just cause; specifically, excessive absenteeism, poor work performance and disloyalty.

REASONS FOR GRANTING THE WRIT

I.

THE COURT HAS GRANTED A WRIT OF CERTIORARI THIS TERM IN A CASE WHICH PRESENTS SUBSTANTIALLY THE SAME ISSUE AS IS PRESENTED IN THIS PETITION.

The Court has this term granted a writ of certiorari in a case involving substantially the same issue as is presented in this petition. *Eastex, Inc. v. NLRB*, 550 F.2d 198

(1977); cert. granted, —— U.S. ——, No. 77-453, October Term, 1977 (January, 1978). *Eastex* involves an attempt by Local 801 of the United Paper Workers International Union to disseminate a news bulletin on the employer's property which addressed *inter alia* such topics as "right to work" legislation and "politics and inflation". Eastex refused to allow the distribution of this bulletin because it addressed topics which "were purely political and did not pertain to anything over which it had authority or power to change or control." 550 F.2d at 198, 201.

Unfair labor practice charges were filed and the Board ruled *inter alia* that the employer's refusal to allow distribution of the entire bulletin on plant premises violated Section 8(a)(1) of the Act. On petition for review, the Fifth Circuit Court of Appeals affirmed the order of the Board holding that the scope of Section 7 protection extends to the dissemination of information on the employer's property which is "reasonably related to the employees' jobs or to their status or condition as employees . . . " 550 F.2d at 203.

In its opinion in *Eastex,* the Circuit Court of Appeals for the Fifth Circuit noted the importance and novelty of the Section 7 issue, and invited final resolution by this Court. A petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit was filed by the employer and was granted by this Court. *Eastex, supra.* In issuing the writ, the Court agreed to resolve five issues, three of which are, when read cumulatively, substantially identical to the issue presented in the instant appeal.[1]

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1. The first three issues presented in Eastex are:
   1. Whether the "mutual aid or protection" language of Section 7 of the National Labor Relations Act grants protection to distribution, by employees on their employer's property, of writings or other materials containing subject matter which is political in nature or is not closely related to the employees' immediate employment relationship?
   2. Whether Section 7 grants protection to the distribution by employees on an employer's premises of any material having a subject matter "reasonably related" to the employees' jobs, status, or condition as employees?
   3. Whether the interference with an employer's property risks which results from application of the "reasonable relation" standard used by the court below is completely out of proportion to the nature and strength of the Section 7 rights to be protected?

II.

ACTION BY THIS COURT IS NECESSARY TO RESOLVE THE IRRECONCILABLE CONFLICT WHICH EXISTS BETWEEN AS WELL AS WITHIN THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE OF GREAT IMPORTANCE TO THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT.

The issue presented in this case is of great importance to the administration of the National Labor Relations Act; namely, the delineation of the protective breadth of the mutual aid and protection clause of Section 7.

To date this task has been undertaken by eight of the Circuit Courts of Appeals with widely different results. The minority approach, adopted by the First[2], Second[3] and Fifth[4] Circuit Courts of Appeals, extends the pro-

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2. *Bethlehem Shipbuilding Corp. v. NLRB,* 114 F.2d 930 (1st Cir. 1940); cert. denied 312 U.S. 710 (1941).

3. *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.,* 130 F.2d 503 (2nd Cir. 1942).

4. *Eastex, Inc. v. NLRB,* 550 F.2d 198 (5th Cir. 1977); cert. granted, —— U.S. ——, No. 77-453, October Term, 1977 (January, 1978).

tective umbrella of Section 7 to all activity by employees which is reasonably related to their employment or to their status as employees.

A majority of the Circuit Courts of Appeals which have addressed this issue, namely the Fourth[5], Sixth[6], Seventh[7] and Ninth[8] Circuit Courts of Appeals, have, on the other hand, adopted the "direct relation" or connection test and will protect employee activity only if the activity is work-related and involves some matter over which the employer has a degree of control.

A conflict over this important issue exists within the Ninth Circuit Court of Appeals as well. In both *Shelly & Anderson Furniture Mfg. Co., supra* and *NLRB v. Tanner Motor Livery Ltd.*, 419 F.2d 216 (9th Cir. 1969) the court strictly construed Section 7 to be protective only of work-related activity, that is, activity which directly involves the terms and conditions of employment. In *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976), however, the court modified its approach and extended Section 7 to protect employee activity which is outside the bounds of the employment relationship. The court did not overrule its prior decisions in this area, thus *Shelly & Anderson Furniture Mfg. Co.* and *Tanner Motor Livery Ltd.* continue to represent the majority view in the Ninth Circuit.

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5. *NLRB v. Bretz Fuel Co.*, 210 F.2d 392 (4th Cir. 1954).

6. *NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811 (6th Cir. 1975).

7. *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966).

8. *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974).

Since the Third Circuit Court of Appeals affirmed the order of the Board in this case without an opinion, we do not have the benefit of the court's analysis on this issue. By so ruling, however, the court has aligned itself with the circuits which have adopted the minority "reasonable relation" test in this area.

Under the minority approach, employee activity which does not directly involve the workplace is protected as long as it is reasonably related to the employee's employment. See *Bethlehem Shipbuilding Corp. v. NLRB, supra*, wherein the court stated: "[t]he right of employees . . . to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection,' including appearance of employee representatives before legislative committees." 114 F.2d at 937; see also *NLRB v. Peter Cailler Kohler Swiss Chocolate Co., supra*, a case involving the discharge of an employee for engaging in a milk strike which was opposed by his employer, where the court theorized "[s]o long as the 'activity' is not unlawful, we can see no justification for making it the occasion for a discharge; a union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side." 130 F.2d at 506.

More recent pronouncements of the "reasonable relation" test include *Kaiser Engineers v. NLRB, supra*, a case involving the discharge of an employee for writing a letter to federal legislators on behalf of an employee organization protesting the proposed relaxation of the restrictions on the immigration of foreign engineers which his employer found embarrassing, wherein the court went on to hold:

"It is true, as Kaiser Engineers points out, that the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship. It is also true, however, that the members of the Civil Engineering Society had a legitimate concern in national immigration policy insofar as it might affect their job security.

We conclude that the concerted activity of employees, lobbying legislators regarding changes in nation policy which affect their job security can be action taken for 'mutual aid or protection' within the meaning of §7, and that the Board's finding upon the evidence herein is supported by substantial evidence on the record considered as a whole and has a reasonable basis in the law."

538 F.2d at 1384-85; and of course, *Eastex, Inc. v. NLRB, supra,* discussed in Section I of this petition, wherein the court extended the scope of Section 7 protection to employee activity which is "reasonably related to the employees' jobs or to their status or condition as employees . . . " 550 F.2d at 203.

As a general practice, however, the circuit courts have employed the "direct relation" standard and have held that activity is protected by Section 7 only if it is work-related and involves some matter over which the employer has some control.

For example, in *Bretz Fuel Co., supra,* the court found unprotected an employee's refusal to cross a picket line which had been established to protest pending legislation. In so holding, the court announced that "[c]oncerted activity is protected only where such activity is intimately

connected with the employee's immediate employment." 210 F.2d at 396.

Moreover, in *Leslie Metal Arts Co., Inc., supra,* a case involving a job walkout in protest of employee harassment by another employee, the court recognized that "[p]rotected activity must in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute.'" "When employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7." 509 F.2d at 813.

Similarly, in *G & W Electric Specialty Co., supra,* the court upheld the discharge of an employee who was attempting to mobilize the employees to protest alleged abuses in the administration of an employee established credit union. In so ruling, the court expressly rejected the "reasonable relation" test tacitly adopted by the court below in the instant case.

> "The Board's decision expresses the view that the ambit of §7 . . . extends to the type of indirectly-related activity . . . (which) . . . bears such a *reasonable* connection to matters affecting the interests of employees *qua* employees as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect.
>
> " . . . Here the activity involved no request for any action upon the part of the Company and did not concern a matter over which the Company had control. . . . It was not an interest derived from their status as company employees or bearing any significant connection to their employment relationship with the Company.

"The sweep of the broad interpretation inherent in the Board's application of the 'or other mutual aid or protection' clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which transcends the subject matter the ACT is designed to embrace — labor-management relations.

"The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion a much broader field than Section 7 is designed to encompass." 360 F.2d at 876-77.

In *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, *supra*, the Ninth Circuit Court of Appeals outlined in a clear and precise fashion the test to be used to define the scope of Section 7 protection. To be protected:

"1) there must be a work-related complaint or grievance;

2) the concerted activity must further some group interest;

3) a specific remedy or result must be sought through such activity;

4) the activity should not be unlawful or otherwise improper."

497 F.2d at 1202-03. Applying this test to the instant case it is easily seen that the employee's conduct wholly fails to possess any of the indicia of protected activity.

First, the object of the protest was not work-related. Petitioner's operating rooms were generally staffed with surgeons, surgical nurses, operating room technicians like Ms. Rea and other surgical personnel each of whom performed a particular task. If a surgical resident was available, he would also be present in the operating room. The residents, however, were not the principal surgeons. They were stationed in the operating room to learn surgery, not to perform the work of the technicians. Loss of the residency program, therefore, would not reduce the number of operations performed by Petitioner and would not have any impact on the amount or type of work performed by the technicians.

Second, inasmuch as the object of the protest was not related to the work performed by the technicians, the activity cannot be construed as furthering any interest of that group. Simply stated, the technicians did not have any interest, economic or otherwise, in the continuation of the residency program.

Third, the remedy sought by the protest, namely the retention of the program, could not be provided by Petitioner since it had no control over the continuation of the surgical residency program. The decision to terminate the program was made over Petitioner's objection by the American College of Surgeons, American Board of Surgery, Council on Medical Education and the American Medical Association.

Finally, the employee's activity was improper and indefensible. This court has affirmed the principle that disloyal activity perpetrated for the purpose of subjecting the employer to embarrassment and criticism does not fit within the protective ambit of Section 7 even though it may be

concerted. "There is no more elemental cause for discharge of an employee than disloyalty to his employer." *NLRB v. Internat'l Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S., 464, 74 S.Ct. 172, 98 L.Ed 195 (1953). See also *NLRB v. Washington Aluminum Co.*, 370 U.S., 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962). This position has recently been reaffirmed by the Board. Citing *Jefferson Standard*, the Board, in *American Arbitration Association*, 233 NLRB No. 12 (1977), held unprotected an employee's sending of sarcastic and derogatory questionnaires to her employer's clients addressing the employer's dress code.

CONCLUSION

The issue presented in this case is of great importance to the administration of the National Labor Relations Act. Furthermore, the decision of the Court of Appeals for the Third Circuit is in conflict with the decisions of four other Circuit Courts of Appeals. Action by this Court is needed to resolve the conflict which exists between the Circuit Courts of Appeals on this important issue. Finally, the Court has this term granted a writ of certiorari in a case involving substantially the same issue. For these reasons, Petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 76-2496

THE READING HOSPITAL AND MEDICAL CENTER,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent

SUR PETITION FOR REHEARING
EN BANC

Present: SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

The petition for rehearing filed by Petitioner

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: December 14, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 76-2496

THE READING HOSPITAL AND MEDICAL CENTER,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent

On Petition for Review of an Order of
The National Labor Relations Board
dated October 27, 1976
Argued September 8, 1977
Before: VAN DUSEN, ADAMS and HUNTER, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions of the petitioner for review, it is

ADJUDGED AND ORDERED that the petition of the Reading Hospital and Medical Center to vacate and set aside the order of the National Labor Relations Board be and the same is hereby denied, and the application by the National Labor Relations Board for enforcement of its order be and the same is hereby granted.

Each side to bear its own costs.

BY THE COURT,
ARLIN M. ADAMS
Circuit Judge

ATTEST:
M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: September 16, 1977

MFP
D-1721
Reading, Penn.

226 NLRB No. 99
UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 4—CA—7237
THE READING HOSPITAL AND
MEDICAL CENTER
and
DISTRICT 1199P, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
A DIVISION OF RWDSU, AFL-CIO

DECISION AND ORDER

On May 27, 1976, Administrative Law Judge Alvin Lieberman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of

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1. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of

the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, The Reading Hospital and Medical Center, Reading, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated: Washington, D.C., October 27, 1976

BETTY SOUTHARD MURPHY,
Chairman

JOHN H. FANNING,
Member

JOHN A. PENELLO,
Member

(SEAL)

National Labor Relations Board

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all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

D-1721
JD-346-76
Reading, PA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case 4—CA—7237
THE READING HOSPITAL AND MEDICAL CENTER[1]
and
DISTRICT 1199P, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO

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(*John D. Thrush, Esq.*,
with them on the brief),
Philadelphia, PA, for the
Respondent.

DECISION

Statement of the Case

ALVIN LIEBERMAN, Administrative Law Judge: The trial in this proceeding, with all parties except the charging party represented, was held before me in Reading, Pennsylvania, on January 12 and 13, 1976, upon the Gen-

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1. The name of respondent appears as amended at the trial.

eral Counsel's complaint dated October 31, 1975,[2] and respondent's answer. In general, the issue litigated was whether respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act).[3] More particularly, the questions for decision are as follows:

1. Did Sheila Rea, while employed by respondent, engage in conduct falling within the protection of Section 7 of the Act?

2. Assuming an affirmative answer to the foregoing question, was Rea discharged in violation of Section 8(a)(1) of the Act because she engaged in such conduct?

Upon the entire record, upon my observation of the witnesses and their demeanor while testifying, and having taken into account the arguments made and the briefs submitted,[4] I make the following:

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2. The complaint was issued pursuant to a charge filed on February 4, 1975.

3. This section provides:

> Sec. 8(a). It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Section 7, insofar as relevant, states:

> Sec. 7. Employees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

4. Although all the arguments of the parties and the authorities cited by them, whether appearing in their briefs or made orally at trial, may not be discussed in this Decision, each has been carefully weighed and considered.

Findings of Fact

I. Jurisdiction

Respondent, a Pennsylvania corporation, is engaged at Reading, Pennsylvania in the operation of a hospital. During 1974 Respondent's gross volume of business exceeded $250,000. In the same period respondent purchased goods valued at more than $50,000 from vendors located outside the Commonwealth of Pennsylvania. Accordingly, I find that respondent is engaged in commerce within the meaning of the Act and that the assertion of jurisdiction over this matter by the National Labor Relations Board (Board) is warranted.

II. Introduction

Briefly, this case is concerned with respondent's suspension and discharge of Shiela Rea, an operating room technician (ORT). The complaint alleges that Rea was suspended and discharged "because [she] engaged in concerted employee activities for the purpose of opposing the discontinuance of Respondent's surgical residency program." Rea's conduct in this regard, the General Counsel, asserts, was protected by Section 7 of the Act. Accordingly, he argues, Rea's suspension and discharge were violative of Section 8(a)(1).

Respondent contends that Rea's conduct was neither concerted nor, if concerted, protected. Furthermore, it is respondent's position that Rea was discharged for cause; namely, her threat to write a letter to a newspaper which respondent had reason to believe would have disparaged its hospital, her excessive absenteeism, and her bad work habits.

III. Preliminary Findings and Conclusions[5]

A. *The Surgical Residency Program and Respondent's Operating Room Personnel*

Under the control of the American College of Surgeons, the American Board of Surgery, the Council on Medical Education, and the American Medical Association, there was in respondent's hospital at all material times a surgical residency program (program) in which physicians, known as surgical residents, participated. Its purpose was to train surgeons. Early in 1975 the foregoing organizations decided that the program should be discontinued in July 1975.

At all relevant periods there were 14 operating rooms in respondent's hospital, almost all of which were in use simultaneously. While surgical procedures were carried on in these rooms there were present, in addition to the surgeon performing the operation, nurses,[6] and, when available, a surgical resident. In this connection, it was estimated by Nancy Feeg, an operating room supervisory nurse, that about "90 percent of the operations [performed] during the [existence of] the residency program were carried on without assistance by a surgical resident."

5. The purpose of these findings and conclusions is to furnish a frame or reference within which to consider the facts relating to respondent's alleged unfair labor practices and to the conclusions to which they may give rise. To the extent that the contentions of the parties relate to the findings and conclusions made here they will be treated here, although they, as well as the findings and conclusions, may again be considered in other contexts.

6. Operating room nurses are classified by respondent as operating room technicians (ORTs).

In the absence of a surgical resident, as Feeg further testified, it was sometimes necessary when an emergency arose during a surgery for an ORT to do things ordinarily done by a surgeon, including "[slipping] a catheter [and making] suture . . . if the physicians hands [were] tied up."

B. *The Nature of Sheila Rea's Activities*

On January 26, 1975,[7] while ORTs, including Sheila Rea,[8] in respondent's employ were in the nurse's lounge preparing to go to lunch they learned that the surgical residency program would be abolished in July. All expressed their displeasure over the impending discontinuance of the program. Among the things they were concerned about was the effect the termination of the program would have upon their work.

In this respect, as Rea testified, she posed the question of "what would happen in cases of an emergency when very major surgery came in, who would take over to assist the surgeon, if the resident was not there?" Concerning this, Rea and other ORTs feared, as Rea further testified, that in the absence of a surgical resident during "major surgery [ORTs] might have to go out of the realm of nursing and enter into the realm of practicing medicine [by being required to place] a suture during surgery, [inserting] a catheter [, or] put[ing] on a temporary clamp" to restrain bleeding.

The ORTs continued to talk about the foregoing matters on their way to, and during, lunch. One suggested cir-

7. All dates hereinafter mentioned without stating a year fall within 1975.

8. Rea's later suspension and discharge are alleged in the complaint as having been violative of Section 8(a)(1) of the Act.

culating a petition in the hospital in the hope that this would result in saving the program. Rea stated, as Marsha Doermann,an ORT present at the foregoing discussion, testified, that "maybe a letter [to a newspaper] might help," and that she "intended to write such a letter."[9]

After lunch on January 26, Rea asked a surgeon, Dr. Ronald Romig, "if," as she recounted, "a petition . . . to the proper authorities . . . would be of any effect to keep the residency program established." Romig replied, Rea related, that "he didn't think so because the decision [to abolish the program] had already been made and he didn't think it would be reversible."

Having received this advice from Romig, Rea did not circulate a petition, nor did she ever write a letter to a newspaper concerning the program's termination. Notwithstanding this, ORTs, including Rea continued that day and on the next day or two to talk about the discontinuance of the program and the effect it would have on their duties.

Respondent contends that Rea did not engage in any activity after the ORTs were informed of the abolition of

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9. Rea denied saying that she intended to write to a newspaper about the abolition of the program. Her denial, however, is contrary to the weight of the evidence and is not credited. My not believing Rea in this respect should not be taken as an indication by me that she was an untrustworthy witness. The contrary is the case. Rea demeaned herself well on the witness stand and impressed me generally as being credible. Findings have already been made on the basis of her testimony and additional findings will be made on the same basis. "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749, 754 (C.A. 2), rev'd on other grounds 340 U.S. 474.

the surgical residency program that was either concerted or, if concerted, protected. I do not agree.

Concerted activity within the meaning of Section 7 of the Act requires "only a speaker and a listener." *Salt River Valley Water Users Association, etc. et al.*, 99 NLRB 849, 853, enf'd in this respect 206 F.2d 325 (C.A. 9). Here the activity was engaged in by several speakers and listeners, all of whom, including Rea, were involved in discussing the effect the termination of the program would have on their work. Therefore, rejecting respondent's contention that Rea did not participate in concerted activity, I find that she did so.

Respondent next argues, on two fronts, that Rea's activity, if concerted, was not protected by the Act. In this regard respondent first contends that it had no control over the object of the ORTs' concerted activity — the retention of the program. For this reason, respondent states on brief, "concerted activities directed toward matters over which the employer has no control, do not fall within the protection of the Act."

Respondent's second point is that the termination of the program would have no impact on the work of the ORTs in the area as to which concern was expressed; namely the enlargement of the ORTs nursing duties to encompass functions more properly performed by a surgeon. This lack of impact on their working conditions, respondent argues, likewise deprives the concerted activity engaged in by Rea and other ORTs of the Act's protection.

Assuming the validity of the premises upon which the foregoing arguments are based, they are, nevertheless, not well taken. That respondent had no control over the reten-

tion of the program or that its abolition would not have required ORTs to do more than they were doing during the program's existence are not determinative of the nature of the concerted activity here carried on. Neither its futility in achieving the retention of the program, nor Rea's mistaken belief that the discontinuance of the program would result in ORTs having to perform duties not within a nurse's competence are detractive of the protection afforded by Section 7 of the Act to the concerted activity engaged in by Rea and other ORTs "for the purpose of [their] mutual aid" in matters related to their work.

It is well settled that the "reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether" such activity is protected by the Act. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U. S. 9, 16. Similarly, the Court held in an earlier case, *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344, that "the wisdom or unwisdom of [employees], their justification or lack of it" has no bearing on the question of whether they are exercising rights guaranteed in Section 7 of the Act. "To hold otherwise," the Board stated in *Ben Pekin Corporation*, 181 NLRB 1025, enf'd 452 F.2d 205 (C.A. 7), "would severely curtail employees' rights to act on behalf of themselves and their fellow employees."

Accordingly, I conclude that the activity engaged in by Rea and other ORTs, including Rea's statement that she intended to write a letter to a newspaper concerning the termination of the surgical residency program,[10] was both concerted and protected by the Act.

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10. Cf. *Walls Manufacturing Company, Inc.*, 137 NLRB 1317, 1318-1319, enf'd 321 F.2d 753 (C.A.D.C.), cert. den., 375 U.S. 923.

IV. The Alleged Unfair Labor Practices

A. *Facts Concerning Respondent's Alleged Violations of Section 8(a)(1) of the Act*

Sheila Rea, a licensed practical nurse, was hired by respondent in October 1970 and assigned to work as an ORT. She was suspended on January 30, 1975, and discharged on February 10. As already noted, Rea's suspension and discharge are alleged in the complaint as having been violative of Section 8(a)(1) of the Act.

Rea was not a model employee. She was frequently absent and shirked unpleasant duties.

As set forth above, on January 26, 1975, Rea and other ORTs learned of the forthcoming termination of the surgical residency program. During their ensuing discussion on that day concerning this matter Rea stated that she intended to write a letter to a newspaper regarding the program's abolition.

Beyond saying that such "a letter might help" Rea did not further elaborate on her statement. Nor does it appear that she told anyone at any time what she planned to include in the letter.

At one point in the discussion by the ORTs in the nurse's lounge on January 26, concerning the program's termination Rea remarked, as Joan Herb, a head nurse, testified, that respondent's hospital was "a terrible place to work" and referred to it as "this G.D. place."

On January 28, Rea's statement that she intended to write a letter to a newspaper concerning the discontinuance

of the program was reported to Dr. Herbert Johnson, respondent's acting director of surgery. Fearing that Rea's letter would be derogatory of the hospital, Johnson told Ronald Schwartz, respondent's administrative assistant for surgical services, that Rea should be directed not to write the letter. Johnson also asked Nancy Feeg, an operating room supervisor, to try to dissuade Rea from writing the letter.

Following his conversation with Johnson, Schwartz informed Thomas Seabourne, respondent's personnel director, of Rea's stated intention to write the letter and suggested that Rea be disciplined. Seabourne agreed. Accordingly, on January 30, Rea was suspended.

The next day Rea received a letter from Seabourne directing her to appear in his office on February 3, for a suspension interview.

The interview, which was held as scheduled, consumed about an hour. A substantial portion of this time was given over to Rea's discussion with other ORTs concerning the discontinuance of the surgical residency program, Rea's opposition to its termination, and her statement that she intended to write to a newspaper. Other subjects were also covered, including Rea's absences and her objection, voiced about a month earlier, to the installation of a chandelier in the hospital's lobby.

On February 10, Rea was discharged by Seabourne, respondent's personnel director. Seabourne testified that "enter[ing] into [his] decision to discharge . . . Rea [was her] threat to write the letter to the newspaper." Respondent's other reasons for terminating Rea's employment, as

stated in its brief, were her "record of bad absenteeism and bad work habits."

B. *Contentions and Concluding Findings Concerning Respondent's Alleged Violations of Section 8(a)(1) of the Act*

"[T]he existence of valid grounds for punitive action [against an employee] is no defense unless such action was predicated solely on these grounds and not by a desire to discourage protected activity."[11] This is the situation here.

Obviously, Rea's discharge would not have been violative of the Act had it been based solely on her absences and bad work habits. *N.L.R.B.* v. *McGahey et al., etc.*, 233 F.2d 406, 413 (C.A. 5). But, as made clear by the testimony of Thomas Seabourne, respondent's personnel director, Rea's stated intention of writing a letter to a newspaper concerning the abolition of the surgical residency program was also taken into account in terminating her employment. Having found that this statement fell within the Act's protection, I further find that Rea's discharge contravened Section 8(a)(1) of the Act.

Inasmuch as Rea's earlier suspension followed hard on the heels of her announcement that she intended to write the letter, I find, additionally, that the suspension was likewise violative of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Montgomery Ward & Co., Inc.*, 242 F.2d 497, 502 (C.A. 2), cert. den. 355 U.S. 829.

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11. *N.L.R.B. v. Fairview Hospital*, 443 F.2d 1217, 1219 (C.A. 7). See also, *N.L.R.B v. Whitin Machine Works*, 204 F.2d 883, 885 (C.A. 1).

In making these findings I have carefully considered, and rejected, respondent's argument that, as it states on brief, it "feared being disparaged by . . . Rea's letter to the newspaper" and that "there was good cause . . . to believe that [in her letter Rea] would exceed the bounds of propriety and work against the interests of the Hospital." In support of this contention respondent points to Rea's remarks in the nurse's lounge, while she and other employees were discussing the termination of the program, that the hospital was a "G.D. place" and a "terrible place to work."

However, these comments were made *in camera*, so to speak, and there is no evidence showing that Rea intended to include them in the letter she said she would write to the newspaper. Nor is there any evidence establishing how Rea would have couched her letter had it actually been written, which is not the case. In these circumstances respondent's reliance in suspending and discharging Rea upon its fear of "being disparaged by . . . Rea's letter" and upon its belief that Rea's letter would have "work[ed] against the interests of the hospital" does not serve to justify Rea's suspension or discharge.[12]

Accordingly, I conclude that by suspending and discharging Rea respondent violated Section 8(a)(1) of the Act.

V. The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices engaged in by respondent occurring in connection with its operations described in

12. Cf. *Salt River Valley Water Users Association, etc, et al.*, 99 NLRB 849, 854, enf'd in this respect 206 F.2d 325 (C.A. 9).

Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

Having found that respondent violated Section 8(a)(1) of the Act by suspending and discharging Sheila Rea because she engaged in activity protected by the Act my Order will require respondent to cease and desist from further violations of Section 8(a)(1) and to take such affirmative action as will effectuate the policies of the Act. In this connection, my Order will require respondent to offer immediate and full reinstatements to Rea and to make her whole for any loss of earnings she may have suffered by reason of her unlawful suspension and discharge. Any backpay found to be due to Rea shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and shall include interest in the amount and manner provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The conduct engaged in by Sheila Rea in connection with the termination of the surgical residency program at respondent's hospital, including her statement of intention

to write a letter to a newspaper in that regard, fell within the protection of Section 7 of the Act.

3. By suspending and discharging Sheila Rea for engaging in conduct referred to in Conclusion of Law 2, above, respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The unfair labor practices engaged in by respondent, as set forth in Conclusion of Law 3, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[13]

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13. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, The Reading Hospital and Medical Center, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, suspension, taking any other disciplinary action against, or in any manner affecting adversely the hire or tenure of employment or any term or condition of employment of, employees for the engaging in any activity protected by, or guaranteed in, Section 7 of the National Labor Relations Act, as amended.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a)(3) of said Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the National Labor Relations Act, as amended:

(a) Offer to Sheila Rea immediate and full reinstatement to her former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges and make her whole, in the manner set forth in the section of this Decision entitled "The Remedy" for any loss of earnings

she may have suffered by reason of her unlawful suspension and discharge.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its premises in Reading, Pennsylvania, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by respondent's representative, shall be posted by respondent immediately upon recipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days, from the date of this Order, what steps have been taken to comply herewith.

Dated at Washington, D.C.

ALVIN LIEBERMAN
Administrative Law Judge

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14. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."